Superior Court of Arizona
in Maricopa County

En Banc

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En Banc
Newsletter of the
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Law Library News

To quote a recent article in the *Arizona Republic* - "Got a Question? Ask the Librarian" - "Library reference desks have long been the best and last hope for desperate people and despite the easier access to information on the Internet, calls to librarians have not diminished." While the article dealt with public libraries in the Valley, and the number of reference questions they answer in a year, the Law Library could very well have been included.

Phoenix Public Library along with their staff of 26 full and part-time librarians answer more than 4000 reference questions a month. The three branches of the Chandler Public Library log 200,000 reference inquires in a year.

Last fiscal year, the six-member team of the Law Library Reference and Information Staff, assisted a total of 34,924 patrons either in person, on the phone or via our email service. Our patron count includes judges and other court personnel, attorneys and their staff, the general public and even other librarians.

From August 31st through September 30th of this year, our web page received 79,617 hits, with a daily average of 2,653. During the month of September, our card catalog, which can be accessed over the Internet, received 2606 hits from 974 distinct users. Our statistics show we had users from 11 different countries including Brazil, Kenya, Switzerland, France, Mexico and the Netherlands.

Patrons can also receive library material through our document delivery service. We deliver documents through the mail, via fax or as attachments to an email. Last year we mailed 4608 pages of information and faxed 3496 pages. We also received 808 requests for copies of articles cited in our bimonthly publication, the *Court Informer*.

Books not owned by our library can be borrowed from other libraries and other libraries can request material from us as well. Last fiscal year we had 356 requests from other libraries to borrow materials owned by us. We, in turn, made 64 requests to other libraries for material not owned by us.

Law libraries have been around since colonial times and while technological advances have changed how we do our jobs and opened up the library's resources to a wider audience, technology will not put us out of a job. Library patrons still need someone to preserve, maintain and retrieve library material. That's where librarians come in.

Electronic Resources

❑ Horizon

When you are researching a question in the Library, you can use the Windows version of our catalog to create custom bibliographies, instead of printing out lists or records of individual titles.

On the list produced by a search, set the arrow by the title you want to add to your bibliography. From the File menu, select Bookmarks, and scroll down to Add Bookmark Entry. The system will ask whether you want to add the title or the item. To see the

title, collection and call number, click the radio button for Item. Clicking the Title button will produce a list with author and title, but not the call number.

As you enter different searches, you may check your bookmark list at any time by selecting View Marked Items in the Bookmark menu. On that screen, you can delete items, click Display to change elements in the entries, and sort the list. To print, view your Bookmark list, from the menu bar, select File and scroll down to Print. The list will be deleted when you close the catalog program.

❑ Internet Site Reviews

History of the Federal Judiciary
http://air.fjc.gov/history/
http://www.fjc.gov/newweb/jnetweb.nsf/fjc_history

History of the Federal Judiciary is a useful source of historical information about federal courts and judges since 1789. Developed by the Federal Judicial History Office "in furtherance of the Federal Judicial Center's statutory mandate to 'conduct, coordinate, and encourage programs relating to the history of the judicial branch of the United States government'," the site is divided into five topical areas.

Judges of the United States Courts provides access to records for each of over 2,800 Supreme Court, circuit court and district court judges since 1789. Each record includes a biography, information about the judge's nomination and confirmation process and federal court service. The database can be search or browsed by name, or, using the *Federal Judges Biographical Database*, searches can be qualified by such factors as chief judges; court and court type; nominating president and party of nominating president; and gender, race and ethnicity.

Courts of the Federal Judiciary provides for each district court, circuit court, and court of appeals and the Supreme Court a legislative history; a chronological list of the judges who served on each court (linked to their biographical entries); information on official records held by the National Archives and Records Administration; and information on published histories of each court. Each legislative history covers statutes governing the organization of the court, and acts authorizing judgeships, dividing states into additional districts, assigning district courts to judicial circuits, and revising the jurisdiction of the court.

Landmark Judicial Legislation provides the text of 21 statutes relating to the organization and jurisdiction of the federal judiciary from the Judiciary Act of 1789 to the 1982 establishment of the Federal Circuit.

Topics in Federal Judicial History covers judicial administrative agencies, chairs of Congressional judiciary committees, judicial impeachments, and notable records and facts of judicial service, including oldest and youngest judges, longest-serving judges, and first women, Black, Hispanic, Asian American and Native American judges.

The *Historic Courthouse Photograph Exhibit* includes photographs of federal courthouses constructed between 1852 and 1939, each accompanied by a description of the building and how it was used by the United States courts.

Amistad: The Federal Courts and the Challenge to Slavery presents a narrative of and key documents from the Amistad case, in which enslaved West Africans on the ship Amistad, bound for the United States, revolted at sea and sought recognition of their freedom in the federal courts.

The site also provides links to selected Federal Judicial Center historical publications and to other sites related to the history of the federal courts.

❑ Publications of Interest on the Internet

A Quiet Revolution in the Courts: Electronic Access to State Court Records
http://www.cdt.org/publications/020821courtrecords.shtml

A basic principle of state court systems has always been "openness." In August of this year, the Center for Democracy and Technology (CDT) released the results of a nationwide survey of how states and other jurisdictions are providing Internet access to court records. While the Internet has become an incredibly useful tool for managing cases, it has, at the same time, proven to be a double-edged sword. The gains in access and efficiency can produce a loss of privacy, increase in costs and other problems.

Efforts to balance these have produced a myriad of policies and procedures that differ from state to state and even within a state. These differences can be fairly dramatic. For example, some states, such as Alabama, require a subscription fee to access court records. The city of Indianapolis charges a flat fee of $4.50 per record. Wisconsin, on the other hand, provides free access to all case information except juvenile, mental, paternity and adoption matters. In addition to fees charged, the content of the information also varies since courts are faced with balancing "privacy and accountability." California provides access to civil records, but limits access to criminal records. Colorado recently added arrest records to its Internet site. Nebraska has no access at all, and South Dakota plans to provide live audio of hearings in October 2002.

As a result of the survey, the CDT also discovered that while some states are forming committees and proposing rules and guidelines for access, other states are doing nothing at all. There are currently an assortment of organizations studying

the ways in which courts can achieve the balance of access and privacy. While these organizations are not trying to implement their programs, they are developing guidelines and making recommendations.

This publication provides a "state-by-state summary" of the types of access available from each state along with a names, addresses and phone numbers of the appropriate contact person.

Did You Know?

Find out how much you actually know legal history. Answers are on the bottom of page.

1. Who was the last Justice to use the spittoon behind the Supreme Court Bench?

2. What Justice was known for playing Trivial Pursuit on the bench?

3. What was the salary of the first Justices?

4.Who was the only Justice to be impeached?

5. What Justice had the most wives?

In the Courts

❑ Recent Arizona Cases

***Porter v. Triad of Arizona*, 1 CA-CV 01-0216 (September 3, 2002).**

Overturning a 1973 ruling, the Arizona Court of Appeals has decided that children who lose a parent due to another person's negligence are exempt from the 2-year statute of limitation as provided by A.R.S. §12-542. In 1994, Mary Jane Porter was treated in a valley hospital for a potassium-depleting condition. She was released from the hospital with medication but two days later suffered a heart attack and was re-admitted. Four days later she died. She was survived by her husband and 3 children who were all under the age of ten.

James Porter, the decedents's husband, filed suit in California against the manufacturer of a diet tea "alleging the product caused or contributed to his wife's condition." The California jury decided against Mr. Porter. It was during that trial that a physician, who was called as an expert witness, stated that the treatment provided by the doctor at the valley hospital "fell below the applicable standard of care and contributed to Mary Jane Porter's death." Mr. Porter subsequently filed a wrongful death suit in Maricopa County on behalf of the couple's three minor children. The case was dismissed after the trial court ruled the case was filed more than two years after the death of Mrs. Porter.

Relying on the 1973 case, *Gomez v. Leverton*, 19 Ariz. App. 604, the Superior Court ruled that A.R.S. §12-502, the minority tolling statute, was not applicable in this case. The court said that because the suit was filed by the father, and not the children, the statute could not be tolled.

Writing for the appellate court, Judge Sult pointed out that a minor is never allowed to file suit on his or her own behalf and that the trial court erred in their interpretation of the legislature's intent in drafting the statute. He continued, "statutes must be given a reasonable construction which will avoid absurd results." Judge Sult reasoned that "if only claims brought by minors are exempt from the two-year statute of limitations but minors cannot sue, then the whole exemption makes no sense." In concluding, the court said that because the minors in the instant case "own" the cause of action and not the father, the claim is protected by A.R.S.§12-502.

❑ From Other Jurisdictions

***Dyas v. Poole*, No. 01-56324 (9th Circuit, October 28, 2002**).

The petitioner, Dyas, was convicted in a California state court of first degree murder and robbery. During the 1991 trial, Dyas was kept in leg shackles while she was in the courtroom. The shackles were also in place as she was led into and out of the courtroom.

The plaintiff's attorney's request to the trial judge that the shackles be removed while in the courtroom was denied. The judge said the "nature of the case was such that he preferred the defendant to wear leg restraints." He also stated that unless the shackles were brought to the attention of the jury, they wouldn't even notice them. It should be noted that during voir dire each prospective juror answered that they would be able to disregard seeing the defendant being led into and out of the courtroom in leg shackles.

The California Court of Appeals later ruled that it was constitutional error to keep the defendant in shackles during the trial, but it was harmless error because the defendant could not produce any evidence that the jurors could see the shackles.

Dyas subsequently filed a petition for writ of habeas corpus with the federal district court. The court held that the defendant had been unconstitutionally shackled and that she was prejudiced by it. One juror had seen the defendant in shackles from the jury box; another had seen the defendant in shackles in a hallway. The 9th Circuit subsequently upheld the district court's adoption of the writ.

In its opinion, the 9th Circuit wrote that shackling a defendant during trial "carries a high risk of prejudice" because it shows the jury that the defendant is "dangerous or untrustworthy." The court continued, "even if one juror is biased by the sight of the shackles, prejudice anc result." A defendant has the constitutional right to be tried by 12 "impartial and unprejudiced jurors."

The court was not persuaded by the State's argument that during voir dire the jurors stated they would not be affected by seeing Dyas in shackles. The appellate court pointed out that the questions in voir dire dealt specifically with seeing the defendant be escorted in and out of the courtroom in restraints. To keep a defendant shackled during trial, "conveys a more continuous and stronger message to the jury that the defendant is dangerous."

New in the Library

❑ Book Reviews

VanBurkleo, Sandra F. *"Belonging to the World": Women's Rights and American Constitutional Culture.* Oxford University Press, 2001.

The year is 2002. How much do you know about women's issues? Issues such as women's rights, equal pay for equal work, etc. If you are a man, probably not much (although that might be a little sexist). Then again, if you are a woman you might not know much about these issues either. Or you might think that there is nothing left to discuss. Women have made great strides in obtaining equal rights, right? After all, there are women judges, women construction workers, women astronauts, women in computer science. Women have the right to vote. Women can own property. The list goes on. What more could women want? What more could women want?

Sandra VanBurkleo explores that question and more. She takes the reader on a historical journey through the issue of women's rights. VanBurkleo divides her book into three sections, looking at the development of women's rights in North America - pre-revolutionary, post-revolutionary and post-Civil War. In the first section, she lays the foundation for all to come - Anglo-American ideals and how they influenced the development of an American version of a sovereignty within the family unit. VanBurkleo uses case analysis to explore the progression of the women's movement. Her book is well organized, thoughtful, amply noted and, yet, concise. She gets to the heart of the matter quickly and efficiently. It's an interesting book. One I am sure you, the reader, would enjoy. Go find it at KF4758 .V36 2001. You will not be disappointed. Trust me.

❑ Article Reviews

Uris, David. "Big Brother and a Little Black Box: The Effect of Scientific Evidence on Privacy Rights." 42 *Santa Clara Law Review* 995 (2002).

We are all familiar with the "black boxes" or flight data recorders that are placed in airplanes to record and monitor the workings of the aircraft at all times. After a crash, these black boxes are the first items that the Federal Aviation Administration (FAA) looks for to find out what happened.

Most consumers are unaware that General Motors has been installing similar black boxes in their vehicles since 1990. These mechanisms, called Event Data Retrieval Units (ERUDs), only record data occurring in the last five seconds before a crash. Starting with the 1999 models, crash data includes the speed of the vehicle before the crash; RPMs of the engine; how much pressure was being applied to the gas, or if the driver attempted to brake. It is logical to surmise that this data will inevitably end up in the hands of the police and could be subpoenaed in a lawsuit.

After an introduction to the use of the technology in the aviation industry and now by selected automobile manufacturers, Uris discusses the following: 1) the history and purpose of black box technology from its beginnings in British aircraft and now in the automotive industry; 2) the historical climate that resulted in Federal Rule of Evidence 702, which allows "novel evidence" into the courtroom; 3) the controversy concerning the admissibility of black box data as evidence and the problems that result for the legal community; 4) whether expert witnesses on black box data can be sufficiently reliable under Rule 702; and 5) proposals to make sure that uniformity and justice actually does prevail.

Traditionally, the data collected after a automobile accident includes measuring and documenting such evidence as tire marks, impact areas, final vehicle resting position, driver and witness statements, and damage to the vehicle. With the increased use of ERUDs, the National Transportation Safety Board (NTSB) has suggested that the National Highway Transportation Safety Administration (NHTSA) and auto manufacturers work together to collect data on accidents by use of black boxes. Many individuals oppose these devices because they are concerned with the possible legal implications, invasion of privacy, and increased cost to consumers.

Of concern are "Big Brother" issues of what law enforcement and insurance companies will do with the data, as well as the question of who actually owns this information, the owner of the car or the manufacturer. There is also the problem that if the manufacturer is the only interpreter of this data, will the fairness and impartiality of the judicial process be compromised?

Consumer advocates and critics of maintain that the boxes deprive individuals of their personal privacy. The boxes are menacing not only because of the data they collect but because of the potential uses of their data. Even though GM cites "research" and "safety" as the objectives of these boxes, they are installed without the consumer's "informed consent."

Car crash specialists are quick to recognize that the black box could revolutionize accident research, as well as auto design, insurance settlement practices, and the way survivors are treated.

The FAA has regulations enforcing the use of the black boxes in airplanes and a similar regulation could be applied to automobiles. The author's proposals for automobile black boxes are: add a provision to Rule 702 to allow them to be used as evidence in a courtroom; require all automakers to install them in every vehicle; and make sure that the automakers are required to verify and test the boxes for reliability. It is also to be noted that with no federal laws regulating the use of black boxes, there is no uniform criteria for data evaluation. Therefore, Uris concludes that "until the black box has become a staple in the automotive industry, with each manufacturer subject to precise installation requirements, it should not be admissible in the courtroom."

Duncan, Meredith J. "The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform." 2002 *Brigham Young University Law Review* 1

In 1983, in Harris County, Texas, Calvin Burdine was represented in a criminal trial by Joe Cannon who was an experienced criminal defense attorney. Cannon was seen sleeping for a few seconds to about ten minutes at a time through substantial parts of both the guilt/innocence and punishment phases of the trial.

The jury convicted Burdine and sentenced him to death. Burdine complained that he had received ineffective assistance of counsel in violation of his Sixth Amendment rights. After sixteen years, and under strong and vehement dissent, a divided court agreed that Burdine received inadequate representation. According to the author, poor lawyering occurs more often than our legal system would like to admit. There are three essential levels of regulating criminal defense conduct: 1) the constitutional level, with an ineffective assistance of counsel claim; 2) the civil level, by means of a criminal malpractice claim; and 3) the disciplinary level, by disciplinary action against the attorney. These mechanisms are all well and good, but the fact remains that regulation of criminal defense lawyering is lacking because: 1) ineffective assistance of counsel is very difficult to prove; 2) criminal malpractice claims are even more difficult to win; and 3) referrals to disciplinary committees are infrequent and unsuccessful.

The first part of this article describes in detail examples of poor lawyering. *Strickland v. Washington*, which is the "preeminent ineffectiveness case decided in the United States Supreme Court" is discussed in detail.

Part II and III survey the safeguards already in place, which actually give us the incorrect impression that the system is actively monitoring criminal defense lawyers who are unconscious, inebriated, and/or incompetent, and helping or making them improve. Safeguards, such as the American Bar Association's *Model Rules of Professional Conduct* or the ABA *Model Code of Professional Responsibility,* have been adopted by all jurisdictions. Yet, monitoring of criminal defense lawyers on the disciplinary level is very underutilized, rendering the system powerless and sadly inadequate in protecting criminal defendants from poor lawyering.

Part IV suggest ways in which the legal system can begin to monitor criminal lawyers' conduct more efficiently. Duncan asserts that criminal defendants are the most vulnerable of all clients, and that they deserve the most protection from poor lawyering, because the consequences are usually dire if they are found guilty. Some of his suggestions are as follows: implementing an automatic referral system; abolishing the requirement that the defendant actually be innocent in order for a criminal malpractice claim to be brought; and encouraging trial judges to document and report instances of poor lawyering.

In conclusion, he describes poor criminal defense lawyering as a "constitutionally infirm representation," a professional negligence, and a violation of "applicable ethical and disciplinary rules." Members of the bar, including judges, must claim responsibility for this problem in our legal system and admit that "lawyers in criminal courts are necessities, not luxuries."

❑ Recently Received Books

Access Denied: Should Youth Access to the Internet be Regulated?
ABA
KF4772 .A93 2001

Bittker, Boris I.
Federal Income Taxation of Individuals, 3rd ed.
Warren, Gorham & Lamont
KF6399 .B57 2002

Bland, F. Paul.
Consumer Arbitration Agreements, 2nd ed.
National Consumer Law Center
KF9084 .B53 2002

Budnitz, Mark E.
Consumer Banking and Payments Law
National Consumer Law Center
KF974 .B83 2002

Charles Dudley Warner Windes, Justice, Arizona Supreme Court
Arizona Republic-Phoenix Gazette and Arizona Weekly Gazette
Ariz. KF373 .W55 1959

Colorado River Tribal Codes
Colorado River Tribe
KF8228.C843 A5

Countywide Evaluation of the Long-term Family Self-sufficiency Plan
Rand
HV98.C2 C68 2002

Countywide Evaluation of the Long-Term Family Self-Sufficiency Plan: Assessing the Utility of the LTFSS Plan Service Delivery and Planning Framework
Rand

HV699.3.C2 C68 2002

Divorce Arizona style
State Bar of Arizona
KFA2500.A75 D58 1973

Elias, Stephen
Patent, Copyright & Trademark: An Intellectual Property Desk Reference, 5th ed.
Nolo Press
KF2980 .E44 2002

Fishman, Stephen
The Copyright Handbook: How to Protect and Use Written Works, 6th ed.
Nolo Press
KF2995 .F53 2002

Gompert, David C.
Shoulder to Shoulder: the Road to U.S.-European Military Cooperability
Rand
UA23 .G714 2002

Handbook on Antitrust Grand Jury Investigations, 3rd ed.
ABA
KF1657.C7 H36 2002

Jin, Chaowu.
Competition Law in China
William S. Hein & Co.
KNQ1234 .J56 2002

Kan, Hongjun.
Does the Medicare Principal Inpatient Diagnostic Cost Group Model Adequately Adjust for Selection Bias?
RAND Graduate School
RA412.3 .K36 2002

Landmark Indian law cases.
William S. Hein & Co.
KF8204.5 .L36 2002

Lawyer's Tool Kit for Health Care Advance Planning
ABA
KF3827.E87 L38 2000

Leadership Roles for Librarians
William S. Hein & Co.
Z682.4.A34 L43 2002

Loonin, Deanne.
Credit Discrimination, 3rd ed.
National Consumer Law Center
KF1040 .C74 2002

Married to the Military: the Employment and Earnings of Military Wives Compared to Civilian Wives
Rand
UB403 .M37 2002

Quick Scan of Post 9/11 National Counter-terrorism Policymaking and Implementation in Selected European Countries
RAND Europe
HV6433.E85 Q53 2002

Report of the Commission on Evaluation of the Rules of Professional Conduct
ABA
KF306 .A759 2000

Representing the Poor and Homeless: Innovations in Advocacy
ABA
KF336 .R46 2001

Rhode, Deborah L.
Balanced Lives: Changing the Culture of Legal Practice
ABA
KF300 .R48 2001

Rossman, Stuart T.
Consumer Class Actions, 5th ed.
National Consumer Law Center
KF8896 .S74 2002

Schwartz, April.
United States Tribal Courts Directory
William S. Hein & Co.
KF8224.C6 S39 2002

Solving Estate Issues
State Bar of Arizona
KFA2544.A75 E78 2000

Summary of State and Local Justice Improvement Activities - 2001
ABA
KF8736 .S86

Trends in Special Medicare Payments and Service Utilization for Rural Areas in the 1990s
Rand
RA412.3 .M7 2002

Weller, Steven.
Criminal Justice System Project Final Report of Evaluation of Findings
Policy Studies Inc.
HV7415 .W45 2001

Wolf, Charles
Straddling Economics and Politics: Cross-cutting Issues in Asia, the United States, and the Global Economy
Rand
HF1359 .W65 2002

Woodard, Cheryl
Starting & Running a Successful Newsletter or Magazine, 3rd ed.
Nolo Press
Z479 .W66 2002

❑ Recent Articles: Evidence

Best, Richard E. "The Need for Electronic Discovery Rules" (August 2, 2002), *available at* http://practice.findlaw.com/feature.html.

Digges, Diana. "Handwriting Analysis Gets a Boost as Forensic Evidence: Controversial New Study Concludes Individual Handwriting Is Unique." 2002 *Lawyers Weekly USA* 15 (July 22, 2002).

Dobbels, Dennis J. and Jennifer J. Chapin. "Frye 2K: Daubert's Not the Only Rule." 44 *For the Defense* 19 (August 2002).

French, Paul. "Unlocking E-Evidence: Know How to Discover Computerized Information." 115 *Los Angeles Daily Journal* 8 (August 13, 2002).

"Illinois Governor OKs DNA Collection." *East Valley Tribune* A13 (August 23, 2002).

Kershaw, Sarah. "Digital Photos Give the Police a New Edge in Abuse Cases." *New York Times* A1 (September 3, 2002).

Lauriat, Honorable Peter. "Judicial Perspective on the Presentation of Medical Evidence." 36 *New England Law Review* 615 (Spring 2002).

Murray, Daniel, Timothy Chorvat and Christopher O'Connor. "Problems of Proof in a Paperless World: Electronic Information as Evidence in Commercial Litigation." 35 *Uniform Commercial Code Law* Journal 1 (Summer 2002).

Park, Robert L. "Science in the Courts." 36 *New England Law Review* 575 (Spring 2002).

Silberberg, Fred. "Rule Against Hearsay Can Place Children in Jeopardy." 115 *Los Angeles Daily Journal* 6 (August 22, 2002).

❑ "Did You Know?" Answers

Questions and answers are from *A Book of Legal Lists: The Best and Worst in American Law* by Bernard Schwartz, located in the Law Library at KF 387.S39 1997.

1. Justice Sherman Milton which always upset the fastidious Justice Harold H. Burton next to him.

2. Justice William H. Rehnquist.

3. $3,500. The first Chief Justice received $4,000.

4. Justice Samuel Chase was impeached in 1805. His acquittal, writes Chief Justice Rehnquist, “assured the independence of federal judges.”

5. Justice William O. Douglas who was married four times.

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